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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-350

THE MIAMI BEACH FIRST NATIONAL BANK
as Executor under the Will of LENORE P. HARTZ,
Deceased, Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 871-4933 — 871-3731

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in the
Supreme Court
of the
United States

OCTOBER TERM, 1971

No. _____

THE MIAMI BEACH FIRST NATIONAL BANK
as Executor under the Will of LENORE P. HARTZ,
Deceased, Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, The Miami Beach First National Bank, as executor of the estate of Lenore P. Hartz, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 30, 1971.

OPINION BELOW

The opinion of the Court of Appeals, reported as 443 F.2d 475 (1971) is appended hereto as Appendix A. The opinion of the District Court for the Southern District of Florida, unofficially reported in 69-2 U. S. Tax Cas. Para 12,627; 25 American Federal Tax Reports, 2d 70-1502, is appended as Appendix B.

JURISDICTION

The judgment of the Court of Appeals, dated April 30, 1971, (Appendix C) was entered on that date. A timely petition for rehearing was denied without opinion on June 7, 1971. The order denying rehearing is appended as Appendix D. This petition for certiorari was filed within 90 days of the entry of that order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Do administrative powers granted to trustees (1) to invest in shares of regulated investment companies and to allocate capital gains therefrom to income and (2) to allocate receipts and expenses between income and principal make the value of a gift in remainder to charity so uncertain that it cannot be deducted for Federal estate tax purposes.

STATUTE AND REGULATION INVOLVED

Section 2055 of the Internal Revenue Code of 1954 and Regulation § 20.2055, (26 CFR 2055) are appended as Appendix E and F, respectively.

STATEMENT OF THE CASE

The decedent, Lenore P. Hartz, created an inter vivos trust on July 7, 1963, reserving to herself the income and the power to amend or revoke the trust. The trust agreement, appended as Appendix G, also provided under Article II:

> 5. The Trustees shall retain all of the remainder of the corpus and undistributed income which shall be held, administered and distributed as follows:
>
> a. If the Settlor's niece, MARY PRIDE COMBS is living, the Trustees shall pay to her, during her lifetime, the sum of Fifty Dollars ($50.00) per month. *Such payments shall be made only from the net income of the trust.*
>
> b. The Trustees shall distribute *all of the rest of the net income of the trust to the Settlor's niece,* MAXINE FORMAN, for life, then upon her death the trust corpus, as then constituted, shall be disposed of as provided in Part c of this Item.
>
> c. Should MAXINE FORMAN predecease MARY PRIDE COMBS, the Trustees shall set apart out of said trust assets an amount sufficient to purchase and shall purchase therewith, an annuity for the remainder of the life of MARY PRIDE COMBS, equal to the sum of Fifty Dollars ($50.00) per month. Subject to this provi-

> sion, upon the death of MAXINE FORMAN, the trust shall then and there terminate. Upon said termination the trust assets, less all proper deductions, shall be paid over to INDIANA UNIVERSITY, Bloomington, Indiana, to be used for scholarships for needy individuals. This charitable gift is to be in memory of R. F. and L. P. HARTZ. (Emphasis added).

The trustees were given the power under Article VI:

> B. To invest and reinvest any property, including but not by way of limitation, bonds, notes, debentures, mortgages, certificates of deposit, common and preferred stocks, and shares of interests in investment trusts, without regard to the proportion any such investment or investments of a similar character may bear to the entire amount of the trust fund or estate.

and with regard to the determination of income and principal under Article VIII, the agreement provides:

> The Trustees may determine in their sole discretion what is income and principal and they may apportion and allocate to income or principal, as they may deem proper, all receipts, credits, disbursements, charges and expenses, including Trustees' commissions whether computed on income or principal, or both. Except insofar as the Trustees shall exercise this discretion, the following rules shall apply:

A. All dividends on shares of a corporation which form a part of the principal of the trust and are payable in the shares of the corporation shall be deemed principal. All dividends payable otherwise than in the shares of the corporation itself, including ordinary and extraordinary dividends payable in shares or other securities or obligations of corporations other than the declaring corporation, shall be deemed income. Where the Trustees shall have the option of receiving a dividend either in cash or in the shares of the declaring corporation, it shall be considered a cash dividend and deemed income, irrespective of the choice made by the Trustees . . .

M. To do all such acts, take all such proceedings and exercise all such rights and privileges, although not hereinabove specifically mentioned, with relation to such property as if the Trustees were the absolute owner thereof, and in connection therewith, to enter into any covenants or agreements binding the Trust Estate. All persons shall be fully protected in relying upon the power of the Trustees to execute every written instrument and no one shall be obligated to see to the application of money or property received by it pursuant to the execution and delivery of such instrument.

Lenore P. Hartz died September 18, 1963. Her will bequeathed her residuary estate to the trustee of the trust described above.

Petitioner as executor filed an estate tax return and at that time paid the amount of $64,078.35 shown to be due on the return. On January 19, 1965, taxpayer filed a claim for refund of $31,744.46 in estate taxes, claiming that a residuary gift to Indiana University qualified for a charitable deduction under Section 2055 of the Internal Revenue Code of 1954. The estate tax return and claim for refund were examined, additional issues were raised, and a partial agreement was effected. Taxpayer, however, reserved the right to sue for a refund of taxes. On December 21, 1966, taxpayer received a notice of disallowance and waived statutory notice of such disallowance on January 16, 1967. Taxpayer paid $5,790.35 in additional estate taxes and $791.21 in interest on April 19, 1967, and $20.40 in interest on July 6, 1967. On September 13, 1967, taxpayer filed a second claim for refund claiming deductions of $6,000.00 for additional expenses of administration. At the time taxpayer filed its complaint, more than six months had elapsed since the filing of the claim for refund and no notice of disallowance had been received by the taxpayer. A notice of disallowance was mailed to taxpayer on July 11, 1968. The District Court held that taxpayer was entitled to a charitable deduction, and on December 24, 1969, the court entered judgment in favor of the taxpayer. The District Court had jurisdiction of the controversy under 28 U.S.C. § 1346(a).

A timely appeal was taken to the United States Court of Appeals for the Fifth Circuit, a court having jurisdiction under 28 U.S.C. § 1291. The Fifth Circuit reversed and remanded the case by judgment dated April 30, 1971. A petition for rehearing was filed by petitioner and denied by an order dated June 7, 1971.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW SHOULD BE REVIEWED IN ORDER TO RESOLVE THE MANY CONFLICTS BETWEEN TAXPAYERS AND THE GOVERNMENT WITH RESPECT TO A TROUBLESOME ISSUE INVOLVED IN NUMEROUS CASES IN THE LOWER COURTS AND IN THE ADMINISTRATIVE PROCEEDINGS WITHIN THE INTERNAL REVENUE SERVICE.

BACKGROUND: Section 2055 of the Internal Revenue Code of 1954 (Ch. 736 § 452, 68A Stat. 152) authorizes a deduction for transfers for public, charitable or religious uses. Treasury regulations thereunder provide that where transfers in trust for both a charitable and a private purpose are made, the deduction may be taken for the value of the charitable interest only insofar as that interest is presently ascertainable and hence severable from the noncharitable interest. Reg. 20.2055. This court has rendered several decisions construing such trusts for the purpose of determining the deductibility of charitable gifts where the dispositive provisions authorize invasion of corpus for the private interest. *Ithaca Trust Co. v. United States*, 279 U.S. 151 (1929); *Merchants Bank v. Commissioner*, 320 U.S. 256 (1943); *Henslee v. Union Planters Bank and Trust Company*, 335 U.S. 595 (1949); and *Commissioner v. Sternberger's Estate*, 348 U.S. 187 (1955). In none of the foregoing cases were administrative powers being questioned as "indirect" powers of invasion.

In 1960, the Internal Revenue Service announced a change in its interpretation of the tax laws, which change

produced this case and other extensive litigation in the courts below. This change in policy was first announced in Revenue Ruling 60-385, 1960-2 Cum. Bull. 77. The ruling stated that a charitable remainder interest in trust was not presently ascertainable and severable from the non-charitable income interest, and thus not deductible under Section 2055 of the Internal Revenue Code of 1954, if the trustee could allocate capital gains distribution of regulated investment companies to income. The Service's earlier position, affirmed in Revenue Ruling 55-620, 1955-2 Cum. Bull. 56, was that the remainder interest was deductible whether capital gains dividends were allocated to principal or income. By Revenue Ruling 67-33, 1967-1 Cum. Bull. 62, the Internal Revenue Service announced that, with respect to trusts created before May 1, 1967, the earlier ruling of 1955 would apply if the right to make the allocation of capital gains to income were afforded by local law, but if the same right were granted in the trust document the 1960 ruling would operate to deny the deduction. Thus at the time the Hartz document became irrevocable, the administrative rule was that tax liability depended upon whether the trustee acquired his power through the trust instrument or by local law.[1]

It was the force of Revenue Ruling 60-385 in the face of a long-standing practice of scriveners of trust documents to provide discretionary powers to facilitate administration of trusts which fathered the volume of litigation of which this case, although involving a substantial sum of money, is a small part. An indication of the labyrinth of cases involving administrative powers is apparent from the list of

[1]In Rev. Rul 60-385 it is conceded that no distinction exists between the two powers other than their origin.

docketed cases kept by the Chief Counsel of the Internal Revenue Service which is set forth as Appendix H. Furthermore we are informed and believe that there are a number of cases still being considered at some administrative level within the Internal Revenue Service.

In addition to *Estate of Lillie MacMunn Stewart*, 52 T.C. 830, rev'd. 436 F.2d 1281 (3d Cir. 1971) which is now before this court on petition for certiorari (No. 1780), the following cases have been recently decided or are believed to be subject to further judicial review:

First Circuit: The Tax Court decided against the government in a case involving broad discretionary allocation powers, applying Massachusetts law, in *Estate of Phyllis W. McGillicudy*, 54 T.C. 315 (1970). The government did not appeal to the Court of Appeals which, however, cited the case with approval in *Old Colony Trust Company v. United States*, 423 F.2d 601 (1st Cir. 1970).

Second Circuit: Judge Lloyd F. McMahon ruled adversely to the government in a case that cannot successfully be distinguished from the case at bar, *Bankers Trust Co. v. United States*, 308 F. Supp. 545, 70-1 U.S. Tax Cas. Para. 12,653, 25 Am. Fed. Tax R.2d 70-1509 (S.D.N.Y. 1970—general discretionary powers under New York law), affirmed on another issue, 71-1 U.S. Tax Cas. Para. 12,748, 27 Am. Fed. Tax R.2d Para. 148,460 (2d Cir. 1971). The government not having chosen to appeal this issue in *Bankers Trust* case, Judge McMahon's ruling is the law in the Second Circuit.

Third Circuit: Peoples Trust Co. of Bergen County v. United States, 311 F. Supp. 1197, 70-1 U.S. Tax Cas. Para. 12,658, 25 Am. Fed. Tax R.2d 70-1531 (D.N.J. 1970) *aff'd*, F.2d, 71-U.S. Tax Cas. Para. 12,786, 27 Am. Fed. Tax R.2d Para. 147,582 (3d Cir. 6/9/71) (capital gains dividends from mutual funds—New Jersey law—held for taxpayer). Also arising under New Jersey law was *Marold v. United States*, 322 F. Supp. 644, 27 Am. Fed. Tax R.2d Para. 148,397 (D.N.J. 1970) involving broad discretionary allocation powers. The government did not appeal the court's decision in favor of the taxpayer.

Fourth Circuit: The government lost in *Greer v. United States*, 70-1 U.S. Tax Cas. Para. 12,690, 25 Am. Fed. Tax R.2d 70-1629 (M.D.N.C. 1970) (broad discretionary investment and allocation powers under North Carolina law). Affirmed Sept. 1, 1971.

Fifth Circuit: The case at bar. In addition to this case, the Court of Appeals has decided two other cases adversely to taxpayers, *Florida National Bank at Lakeland v. United States*, 443 F.2d 467, 71-1 U.S. Tax Cas. Para. 12,771, 27 Am. Fed. Tax R.2d Para. 147,568 (5th Cir. April 26, 1971) (Florida law, capital gains to be included in distributions to income beneficiaries) and *First National Bank of Palm Beach v. United States*, 443 F.2d 475 (5th Cir. 1971) 71-1 U.S. Tax Cas. Para. 12,777. Still another case has just been decided in this circuit in the taxpayer's favor, *Doss v. United States*, Civil Action 5-693 (N.D. Tex. May 20, 1971) (broad investment powers).

Sixth Circuit: The taxpayer won in *Estate of Toulmin v. United States*, __F. Supp._____ 71-1 U. S. Tax Cas. Para. 12,755, 27 Am. Fed. Tax R.2d Para. 147,560 (S.D.

Ohio, March 19, 1971) (general discertionary allocation powers under Ohio law). Whether the government will appeal has not been announced.

Ninth Circuit: On appeal to the Court of Appeals is *Gardiner v. United States* (not officially reported), 69-2 U.S. Tax Cas. Para. 12,628, 24 Am. Fed. Tax R.2d 69-6108 (D. Ariz. May 21, 1969) (Arizona law, general discretionary allocation powers—held for taxpayer).

The chaos, conflict and confusion in the lower courts should be resolved by a review of the case at bar by this court.

2. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE UNITED STATES COURT OF APPEAL, THIRD CIRCUIT, IN PEOPLES TRUST COMPANY OF BERGEN COUNTY.

The Third Circuit in *Peoples Trust Company of Bergen County v. United States*, __F.2d__, 71-1 U.S. Tax Cas. Para. 12,786, 27 Am. Fed. Tax R.2d Para. 147,582 (6/9/71) found that administrative powers granted to a trustee similar to the powers in the case at bar did not make the value of the charitable remainder so uncertain as to deny the deduction. In that case, the trust agreement expressly authorized the trustee to allocate capital gains dividends to income and also authorized the trustee to do all acts which the trustee deemed advisable even though such act may not be appropriate for fiduciaries under any statutory or other rule of law. That court referred to our case and stated:

> We are aware that the Fifth Circuit, in two cases arising under Florida law, has accepted much of the position advanced here by the [government] with respect to clauses similar to Article 9. *The Florida National Bank at Lakeland v. United States*, No. 30-183 (5 Cir. April 26, 1971); *The Miami Beach First National Bank v. United States*, No. 29,524 (5th Cir. April 30, 1971). The trust provisions in those cases are different than here, and the law of Florida, as set forth in those opinions, apparently differs from that of New Jersey. 71-1 U.S. Tax Cas. Para. 12,786 at 9055-5, 27 Am. Fed. Tax R.2d Para. 147,582 at 148,643-44, Appendix A at 12a.

The Third Circuit's failure to follow the Fifth Circuit's lead constitutes a clear conflict. Its desire to distinguish the case rather than reflect unfavorably on a judgment of a sister court is understandable. The distinctions, however, are not real. The statement quoted above shows the government's position to be the same as that argued before the Fifth Circuit in the case at bar. In both cases the government is attacking discretionary administrative powers. The government's position is the crux of the problem and the source of the litigation throughout the United States. Equitable treatment of all taxpayers wherever they may reside is such an important principle of taxation that it should not be permitted to die as the result of the Third Circuit's subtle distinctions encouraged by judicial etiquette. A review of this case by the court will assure such equality.

3. THE DECISION OF THE FIFTH CIRCUIT IN THIS CASE CONFLICTS IN PRINCIPLE WITH THE DECISIONS OF THE FIRST CIRCUIT IN OLD COLONY TRUST COMPANY V. UNITED STATES AND IN THE TENTH CIRCUIT IN UNITED STATES V. POWELL.

The Internal Revenue Service's attack on administrative discretion obtained its impetus from its early success in *State Street Trust Co. v. United States*, 263 F.2d 635 (1 Cir. 1959), where the First Circuit found that a settlor-trustee had retained the right to designate the persons who would enjoy the income of the trust property under §2036(a)(2) of the Code and the power to alter or amend the trust under Section 2038 because of the broad administrative powers in the trust instrument. In cases involving §2036 and §2038 transfers, the question is precisely the same as the question presented in the case at bar and the many other cases involving the deductibility of charitable remainders. The question in both types of cases is whether the trustee in his exercise of administrative powers can ignore the equitable principle which requires that he administer the trust with impartiality as to all interests. See Scott, *Trusts*, §183 and §232 (3d ed. 1967) Lowell, *Florida Law of Trusts* (1965) §80. If the trustee is under a duty to act with impartiality there is no retained power under §2036 and §2038 and a charitable remainder interest must necessarily be preserved and, therefore, be deductible.

The recent decision of the First Circuit in *Old Colony Trust Company v. United States*, 423 F.2d 60 (1970), is in conflict with the decision of the Fifth Circuit in our case. In *Old Colony Trust* the same court which had ren-

dered the decision in *State Street* clearly and unequivocally reversed itself and stated:

> We do not believe that trustee powers are to be more broadly construed for tax purposes than the probate court would construe them for administrative purposes. More basically, we agree with Judge Magruder's observations that nothing is 'gained by lumping them together.

The Tenth Circuit in *United States v. Powell* 307 F.2d 821 (1962), decided that discretionary power to purchase life insurance or annuity contracts are not sufficient to require that the property be included in the settlor-trustee's gross estate under the §811(d)(2) of the Internal Revenue Code of 1939, 26 USC §811, the forerunner of §2038. The court there stated:

> Accordingly, it is the duty of the trustees in the exercise of their discretion to invest the corpus for the benefit of the trust estate and in such manner as to preserve a fair balance between the life tenant and the remainder beneficiary. *That constitutes an ascertainable, external and judicially established standard, enforceable by the courts of equity in the exercise of their power to review the action of trustees in administering trust.* (Emphasis supplied)

In principle, *Old Colony Trust Co., supra,* and *Powell, supra,* are in conflict with the decision of the Fifth Circuit in this case. Both decisions, unlike the Fifth Circuit in *Hartz,* recognized the duty imposed upon fiduciaries to deal impartially in carrying out the settlor's wishes as

expressed in the dispositive provision. The failure of the Fifth Circuit to recognize this judicially established standard as an effective tool to preserve principal has created a conflict which should be resolved by this court.[2]

For these reasons, a writ of certiorari should issue to review the judgment and opinion below.

Respectfully submitted

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[2]The duty to deal impartially as among several beneficiaries is such a common and consistently followed principle that Professor Scott lists no states with a contrary view. Scott, Trusts, §183, 232. This rule has application in Florida. Lowell, Florida Law of Trusts, §80. Thus the conflict among the circuits in tax cases must be accepted as conflicts in the interpretation of tax law rather than differences in local law.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29524

THE MIAMI BEACH FIRST NATIONAL BANK, as Executor under the Will of LENORE P. HARTZ, Deceased,

Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

(April 30, 1971)

Before TUTTLE, AINSWORTH and SIMPSON,
Circuit Judges.

TUTTLE, Circuit Judge: This case is a companion case to the Florida National Bank at Lakeland and J. B. O'Neill, Co-executors of estate of Hugh H. Nelson, deceased v. United States of America, No. 30,188, F.2d decided April 26, 1971, in that both cases deal with the application of §2055 of the Internal Revenue Code of 1954 to a charitable bequest to a recognized charity, here a gift to Indiana University, after the death of two life beneficiaries. The question is similar in that it is whether broad powers vested in the trustees as to investments, allocations between income and principal, and other discretionary acts so permit diversion of the remainder to the life beneficiaries as to prevent the interest which may ultimately pass to the charitable remaindermen being "presently ascertainable, and hence severable from the noncharitable interest". Treasury Regs. on estate tax, 1954 Code 26 CFR §20.2055-2.

The answer to the question must depend upon our determining whether the standards of ascertainability and certainty established in the five Supreme Court cases, and articulated in Internal Revenue Regulations permits an affirmance of the judgment of the trial court which concluded that none of the provisions of the inter vivos trust prevented the deduction of a charitable bequest to the remainderman.

We need not again discuss the several holdings of the cases referred to, although we cite them here for ready convenience. They are Humes v. United States, 276 U.S. 481 (1928); Ithaca Trust Company v. United States, 279 U.S. 151 (1929); Merchants Bank v. Commissioner, 320 U.S. 256 (1943); Henslee v. Union Bank

and Trust Company, 335 U.S. 595 (1949) and Commissioner v. Sternbergers Estate, 348 U.S. 187 (1955).

The provisions of the inter vivos trust that are here relevant are as follows: Section VI provided as follows:

> The Trustees shall have the following general powers, duties and discretion in addition to those now or hereafter conferred by law:
>
> A. To retain as an investment any property at any time forming a part of the Trust Estate without regard to the proportion which such property, or property of a similar character, so held, may bear to the entire amount of the Trust Estate.
>
> B. To invest and reinvest any property, including but not by way of limitation, bonds, notes, debentures, mortgages, certificates of deposit, common and preferred stocks, and shares or interests in investment trusts, without regard to the proportion any such investment or investments of a similar character may bear to the entire amount of the trust fund or estate.
>
> * * * *
>
> M. To do all such acts, take all such proceedings and exercise all such rights and privileges, although not hereinabove specifically mentioned, with relation to such property as if the Trustees were the absolute owner thereof * * *. (Emphasis added)

VII. INCOME AND PRINCIPAL

The Trustees may determine in their sole discretion what is income and principal and they may apportion and allocate to income or principal, as they may deem proper, all receipts, credits, disbursements, charges, and expenses, including Trustees' commissions whether computed on income or principal, or both. Except insofar as the Trustees shall exercise this discretion, the following rules shall apply:

A. All dividends on shares of a corporation which form a part of the principal of the trust and are payable in the shares of the corporation shall be deemed principal. All dividends payable otherwise than in the shares of the corporation itself, including ordinary and extraordinary dividends payable in shares or other securities or obligations of corporations other than the declaring corporation, shall be deemed income. Where the Trustees shall have the option of receiving a dividend either in cash or in the shares of the declaring corporation, it shall be considered a cash dividend and deemed income, irrespective of the choice made by the Trustees.

* * * *

D. Where any part of the principal consists of bonds or other obligations for the payment of money, they shall be deemed principal

> at their inventory value or in default thereof at their market value at the time they become a part of the Trust Estate, regardless of their par or maturity value, and upon their respective maturity or upon their sale, any loss or gain realized thereon shall fall upon or inure to the principal.
>
> After the death of the Settlor the Trustee shall make an annual accounting to the adult primary beneficiary or beneficiaries of the Trust Estate. The approval of any account by such primary beneficiary or beneficiaries shall be final and binding upon all persons as to the matters and transaction shown in that account.

It is the government's contention that the principles to be distilled from the Supreme Court decisions and as articulated under the long-standing Treasury Regulation 20.2055-2[1] require a holding that the corpus of this trust

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[1](a) Remainders and similar interest. If a trust is created or property is transferred for both a charitable and a private purpose, deduction may be taken of the value of the charitable beneficial interest only insofar as that interest is presently ascertainable, and hence severable from the non-charitable interest. The present value of a remainder or other deferred payment to be made for a charitable purpose is to be determined in accordance with the rules stated in Sec. 20. 2031-7. Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay the principal to a charitable organization, the present value of the remainder is deductible. To determine the present value of such remainder use the appropriate factor from column 4 of Table I or Table II of Sec. 20.2031-7, whichever is applicable.***

(b) Transfers subject to a condition or a power. If, as of the date of decedent's death, a transfer for charitable purposes is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless

is so subject to invasions by the broad discretion granted to the trustees as to make the interest which will pass to charity neither "presently ascertainable and hence severable from the non-charitable interest" nor measurable by an objective standard "fixed in fact and capable of being stated in definite terms of money".

The appellees, to the contrary, base their argument primarily upon the proposition that under a Florida concept of fiduciary obligations "the trustees' duty to deal impartially as between successor beneficiaries is an ascertainable, external and judicially established standard which will protect and preserve the gift of corpus to Indiana University." Taxpayers point out that in the named Supreme Court cases, the court had to construe "dispositive" provisions which "either direct or permit a trustee to distribute the corpus to private beneficiaries under certain circumstances." They distinguish the present case by saying that here the court is asked to determine "whether a power of invasion was granted" rather than "whether a power to invade which was clearly given would be exercised." They contend that the trustees here have no power of invasion.

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the possibility that the charitable transfer will not become effective is so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of a decedent's death and the estate or interest would be defeated by the performance of some act or the happening of some event, the occurrence of which appeared to have been highly improbable at the time of the decedent's death, the deduction is allowable. If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, the deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of the power.*** (Emphasis added.)

Laying aside for the moment the question as to whether, under Florida law, a court of equity would interfere with a discretionary exercise of the powers plainly and literally granted in this will to favor either the life tenant or the remainderman, it must be apparent that the powers literally granted to the trustees, if exercised in each instance for the benefit of the life beneficiaries, might materially reduce the expectation of Indiana University to receive a measurable part of the corpus of this estate.

In the first place the trust instrument expressly authorizes the trustees to retain any investments held at the time the property was conveyed to them. It expressly authorized an investment or reinvestment in all kinds of securities including "shares or interests in investment trusts."

It is plain that to the extent that current dividends received by the trustees from investment trust shares or mutual fund shares would include any gains received by the investment trust upon its disposition of its underlying investments or would include realized gains from liquidations of any of its holdings in corporations that might be subject to liquidation, this would be an invasion of corpus if all dividends were considered as income by the trustees.

Revenue ruling 60-385 clearly points out the potential for an invasion of capital for the benefit of a life tenant.

> "Where a trust instrument provides that the trust income shall be paid to a life tenant, that the corpus may be invested in stock of regulated investment companies, and that dividends received

by the trustees which represent capital gains realized from the sale of securities owned by such companies shall be treated as corpus and held for the benefit of a charitable remainderman, then the charitable remainder interest is severable from the noncharitable interest, and its present worth may be ascertained. The present worth of such a charitable remainder is deductible for income, estate, and gift tax purposes in the manner and to the extent provided in sections 170, 2055 and 2522 of the Internal Revenue Code of 1954.

However, if the trust instrument provides that dividends representing capital gains realized as aforesaid shall (or, in the trustee's discretion, may) be treated as income and paid to the life tenant, or if the instrument could be so construed under applicable local law, then the charitable interest is not severable from the noncharitable interest since no known formula has been advanced for ascertaining the value of the charitable interest. Therefore, no deduction for income, estate, or gift tax purposes is allowable with respect to the transfer."

While such a ruling does not of course, have the force of a regulation or of a statute, it is quoted here to make plain what the true distinction is. Moreover, such a regulation is entitled to be given weight as expressing the studied view of the agency whose duty it is to carry out the statute. See Macey's Jewelry Corp. v. United States, 387 F.2d 70 (C.A. 5 1967).

Moreover, dividends received from mutual funds might well be in the form of "stock dividends" in the fund itself. Such stock dividends normally are accretions to the capital. However, when, as testified to by taxpayer's witness, capital gains distributions from a mutual fund may be offered to share holders in the form of cash or additional shares in the mutual fund, the express provision of the trust takes over. In such a situation:

> (a) supra, provides "where the trustees shall have the option of receiving a dividend either in cash or in the shares of the declaring corporation, it shall be considered a cash dividend and deemed income, irrespective of the choice made by the trustees." (Emphasis added)

In such a situation the trustees are not even given the option to allocate a dividend representing a capital gain to corpus. They are directed to allocate it to income.

The possibility of an invasion of the kind envisioned above is not remote. Both federal statutes and Florida laws recognize that a mutual funds distribution in the form of dividends may represent both capital gains distributions and ordinary investment income. (See Florida Statute Annotated, § 690.03.)

The government points further to the explicitly broad powers of the trustees to "determine in their sole discretion what is income and principal and they may apportion and allocate to income or principal, as they may deem proper, all receipts, credits, disbursements, charges and expenses, including trustees commissions whether computed on income or principal or both."

We do not assume that a fiduciary under general fiduciary principles would be so brash or so derelict in his duty as to make a bookkeeping entry and simply transfer 100 shares of stock belonging to the corpus of the estate to the life beneficiaries as income. Such a proceeding would fall afoul generally accepted fiduciary principles (see III Scott Trust, §233.5 [third edition, 1967]; also Lowell, Florida Law of Trust, 1965 §80 at 206.)

The taxpayers rely heavily on the case of Wallace v. Julier, 147 Florida 420 3S2d 711, (1941). As we read both these treatises and the Florida case, it is apparent that the fiduciary in the exercise of his investing judgment, must exercise an honest discretion such, for instance, as determining to what extent he shall invest in securities holding opportunities for enhancement as against investing in securities producing the greatest yield consistent with safety. The language of these writings bear heavily on this sort of discretion to be exercised by the trustee. However, all of the writings indicate clearly that where a specific authority is granted to the trustee to depart from normal accounting principles, the trustee shall be given the authority to do these discretionary acts unless they are inconsistent with the purpose of the testator or the creator of the trust. The Julier case is a clear indication of this distinction. In that case the trustees had failed to distribute some ten years of income to the life tenants, apparently merely permitting it to accumulate. The trial court directed that the income be distributed. However, it is also apparent that the will there before the court for construction authorized an allocation of "any profits, accretions or increases as income and to determine, in their absolute discretion, what receipts shall be regarded as income and what receipts shall be regarded as princi-

pal for all purposes connected with the administration of my estate or of any fund created hereunder." The court having already said that "it is too well settled in this and other jurisdictions that the lode star followed by the courts in construing a will is the intent of the testator as gathered from what was written in the will", then said:

> "The entire context of the will evidences the intention of the testatrix to make ample provision for the two life tenants named in the residuary clause of the will and it is apparent that to carry into effect this intent she vested extraordinary powers in her trustees. It, therefore, follows that the will shall not be so construed as to allow the power vested in the trustees to defeat the paramount intent of the testatrix."

The court thereupon directed that the accumulations of the ten year period, clearly including "accretions and increases" be distributed to the income beneficiaries. The court thus gave full scope to the "extraordinary powers" vested in the trustees.

We perceive no power granted here with respect to the investment in mutual funds or the treatment of dividends received therefrom or in carrying out the specific authorization to charge expenses normally chargeable against income against the corpus of the estate (it is to be particularly noted that this power expressly includes "trustees commissions whether computed on income or principal or both") which, if exercised would run afoul the principles of fiduciary management and relationships under the Florida law.

The record does not disclose, and therefore we, of course, are not at liberty to speculate on how much diversion might normally be made by virtue of the powers of investment and allocation of receipts and expenditures as between the income beneficiaries and the remainderman would occur if the trustees carried out with discretion the extraordinary powers given them in this inter vivos trust. However, recognizing, as we do, that the creator of the trust fully understood that trustees commissions and certain expenses for the obtaining or creation of income might properly be charged against income were it not for the express grant of authority he included in his trust instrument, it is impossible for the court to say that the invasions of corpus resulting from these powers would not be significant. If so, by definition "the possibility that the charitable transfer will not become effective is" not "so remote as to be negligible" (see Henslee v. Union Planters Bank, supra.) The trial court thus erred in holding that the estate was entitled the claim to charitable deduction.

The judgment is REVERSED and the case REMANDED for further proceedings not inconsistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER 68-535-Civ-JE

THE MIAMI BEACH FIRST NATIONAL BANK,
as Executor under the Will of Lenore P. Hartz, deceased,
Plaintiff,

-v-

UNITED STATES OF AMERICA,
Defendant.

(Filed September 2, 1969)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This suit for refund of estate taxes came on for trial before the Court without a jury. The Court has considered the evidence in the cause, the proposed conclusions of law and the memoranda presented by counsel for the parties.

The basic facts have been stipulated to by the parties in the pretrial stipulation filed with the Court. The Plaintiff is the executor of the will of Lenore P. Hartz. The decedent created an inter vivos trust with the Plaintiff as trustee. The income of the trust went to the decedent for her life and then to two other income beneficiaries with the corpus of the trust going to a charitable institution as remainderman. Plaintiff failed to take a deduction for the charitable gift on the estate tax return and when plaintiff filed an amended return and claim for refund, the refund was disallowed.

Therefore, the Court finds and concludes as follows:

1. The Court has jurisdiction of this action under Title 28 U.S.C. Section 1346(a).

2. Plaintiff is the executor of the will of Lenore P. Hartz, having been appointed by the County Judges' Court, Dade County, Florida, on October 4, 1963.

3. On December 18, 1964, plaintiff filed an estate tax return, Form 706, for the estate with the District Director of Internal Revenue for the District of Florida, Jacksonville, and at that time paid to the defendant the sum of $64,078.35, the amount shown on the return to be due and payable.

4. On January 19, 1965, plaintiff filed with the District Director a claim for refund of estate tax in the amount of $31,774.46, since the return as originally prepared and submitted failed to claim as a charitable deduction under Section 2055 of the Internal Revenue Code, a residuary gift to Indiana University.

5. The estate tax return and claim for refund were examined by the defendant's agents, additional issues were raised and a partial agreement between plaintiff and defendant was made reserving to the plaintiff, however, the right to sue for a refund of the taxes on the grounds set forth in the complaint.

6. On December 21, 1966, plaintiff received notice of disallowance of its claim of January 19, 1965, and waived statutory notice of such disallowance on January 16, 1967.

7. On September 13, 1967, plaintiff filed with the District Director a second claim for refund, asserting its right to an additional refund of taxes based upon a de-

duction of additional administration expenses totalling $6,000.00, $5,000.00 as additional attorneys' fees and $1,000.00 for additional executor's commissions. At the time of the filing of the complaint more than six months had expired since the filing of the claim for refund and no notice of disallowance had been received by the plaintiff. A notice of disallowance was mailed to the plaintiff on July 11, 1968.

8. Attorneys' fees in the amount of $5,000.00 in addition to those allowed by the defendant as a deduction and executor's commissions in the amount of $1,000.00 in addition to those allowed by the defendant, if approved by the County Judges' Court, will be allowed in the computation of the estate tax, if any, to be refunded to the plaintiff.

9. Plaintiff paid to the defendant on account of said estate tax, the following amounts:

	Estate Tax	Interest
December 18, 1964	$64,078.35	$
April 19, 1967	5,790.36	791.21
July 6, 1967		20.30
Total	$69,868.71	$811.61

10. The parties agreed that the computation of the tax to be refunded, if any, shall be made by the Internal Revenue Service, approved by plaintiff, and incorporated in the judgment submitted to the Court for entry.

11. Decedent, Lenore P. Hartz, created an inter vivos revocable trust by an instrument dated July 17, 1963, naming the Miami Beach First National Bank and Maxine Forman as Trustees. The decedent's will bequeathed her residuary estate to the inter vivos trust.

12. Under the terms of the trust, Mrs. Hartz received the net income from the corpus of the trust for the remainder of her life. The trust instrument provides a number of distributions upon her death, with the remainder of the corpus being retained and a specific amount ($50.00) per month to be paid to Mary Pride Combs for her life, with the remainder of the net income to be distributed to Maxine Forman for her life. Provisions are included to continue the payments to Mary Pride Combs upon the death of Mrs. Forman by means of the purchase of an annuity and, subject only to the purchase of the annuity, the trust then terminates. At the death of Mrs. Hartz on September 18, 1963, Mary Pride Combs was 47 years of age and Maxine Forman was 62. The corpus of the trust left after its termination is to be paid over to Indiana University to be used for scholarships for needy individuals. Indiana University is an educational institution which meets the requirements of Section 2055 of the Internal Revenue Code. The value of the remainder to Indiana University may be determined by the application of mortality tables published by the defendant unless uncertainty results from the provisions of the trust agreement.

13. In Section VI of the trust instrument, entitled General Powers of the Trustees, the trustees are given the power "To invest and reinvest any property, including but not by way of limitation, bonds, notes, debentures, mortgages, certificates of deposit, common and preferred stocks, and shares or interests in investment trusts, without regard to the proportion any such investment or investments of a similar character may bear to the entire amount of the trust fund or estate."

Section VII of the trust instrument, entitled Income and Principal, provides, in regard to the determination of income and principal:

"The Trustees may determine in their sole discretion what is income and principal and they may apportion and allocate to income or principal, as they may deem proper, all receipts, credits, disbursements, charges and expenses, including Trustee's commissions whether computed on income or principal, or both. Except insofar as the Trustees shall exercise this discretion, the following rules shall apply:

> "A. All dividends on shares of a corporation which form a part of the principal of the trust and are payable in the shares of the corporation shall be deemed principal. All dividends payable otherwise than in the shares of the corporation itself, including ordinary and extraordinary dividends payable in shares or other securities or obligations of corporations other than the declaring corporation, shall be deemed income. Where the Trustees shall have the option of receiving a dividend either in cash or in the shares of the declaring corporation, it shall be considered a cash dividend and deemed income, irrespective of the choice made by the Trustees."

14. The trustees accepted as a part of the property transferred to the trust 116 shares of Keystone Custodian B-3 and 744 shares of Keystone Custodian S-2, regulated investment company stock. This stock was liquidated on September 24, 1963. Since that time no regulated in-

vestment company stock has been owned by the trustees. As of January 15, 1969, the corpus of the trust had a value of $191,731.87, subject to the fees and commissions of $6,000.00, if approved by the County Judges' Court.

15. The only issue to be decided in this case is whether the power given to the trustees to invest in regulated investment companies, and to allocate capital gains distributions to the income beneficiary, coupled with the power to determine what is income and what is principal, make the value of the charitable remainder interest so uncertain as to be not presently ascertainable. If not presently ascertainable, the charitable remainder interest would not qualify as a charitable estate tax deduction under Section 2055 of the Internal Revenue Code of 1954.

16. The Treasury Regulations of Estate Tax (1954 Code), 26 C.F.R. Sec. 20.2055-2, provides:

"Transfers not exclusively for charitable purpose

(a) Remainders and similar interests. If a trust is created or property is transferred for both a charitable and a private purpose, deduction may be taken of the value of the charitable beneficial interest only insofar as that interest is presently ascertainable, and hence severable from the noncharitable interest."

17. The Internal Revenue Service has handed down a ruling which covers the question involved here. Rev. Rul. 60-385, 1960-2 Cum. Bull. 77, provides in part:

"Where a trust instrument provides that the trust income shall be paid to a life tenant, that the corpus may be invested in stock of regulated investment companies, and that dividends received by the trustee which represent capital gains realized from the sale of securities owned by such companies shall be treated as corpus and held for the benefit of a charitable remainderman, then the charitable remainder interest is severable from the noncharitable interest, and its present worth may be ascertained. The present worth of such a charitable remainder is deductible for income, estate, and gift tax purposes in the manner and to the extent provided in sections 170, 2055, and 2522 of the Internal Revenue Code of 1954.

"However, if the trust instrument provides that dividends representing capital gains realized as aforesaid shall (or, in the trustee's discretion, may) be treated as income and paid to the life tenant, or if the instrument could be so construed under applicable local law, then the charitable interest is not severable from the noncharitable interest since no known formula has been advanced for ascertaining the value of the charitable interest. Therefore, no deduction for income, estate, or gift tax purposes is allowable with respect to the transfer."

That Revenue Ruling would seem to be controlling of the issues in this cause. However, Revenue Rulings do not have the force of law. They are not entitled to the deference normally given to Treasury Regulations as they are only informal rulings of the IRS in answer to the taxpayer's questions. King Trailer Co. v. U. S., 228 F.Supp. 1013 (S.D. Cal. 1964). They are not binding upon the court. Bennett v. U. S., 186 F.2d 407 (5th Sir. 1951). Revenue Rulings should not be automatically applied in

every case but they are certainly entitled to be given weight. Macey's Jewelry Corp. v. U. S., 387 F.2d 70 (5th Cir. 1967). Rulings may not be arbitrary or unreasonable, or extend the scope of terms of a tax statute, and are entitled to no more weight than the reasons sustaining them. King Trailer Co. v. U. S., supra.

18. It is well settled that where trustees are granted broad powers to invade the corpus of a trust for the benefit of the income beneficiary, the remainder to charity is not deductible because, in the absence of some legal standard, it is impossible to determine the extent of the invasion, and the remainder is thus made "unascertainable." Merchants Bank v. Comm., 320 U.S. 256 (1943); Henslee v. Union Planters Bank, 335 U.S. 595 (1948); Newton Trust Co. v. Comm., 160 F.2d 175 (1st Cir. 1948); Zentmayer's Estate v. Comm., 336 F.2d 488 (3rd Cir. 1964); Union Trust Co. v. Tomlinson, 355 F.2d 40 (5th Cir. 1966).

19. The defendant would have the Court equate the power to invade the corpus with the power to allocate capital gains distribution. The two are not analogous. The reason for the requirement of ascertainability is that the estate is seeking a deduction for a charitable remainder which will be received in the future. To obtain that deduction, the tax laws require that the charity receive at least the amount which is deducted. This minimum contribution to charity must be fixed so that barring that general uncertainty which attends human affairs, the charity will receive at least that amount at a future date. When there is a power of invasion of the corpus, with the extent of the invasion undeterminable, it becomes impossible to set a certain minimum amount that the charity will receive. The power to allocate capital gains income presents a very

different situation. Capital gains are traditionally considered an increment to principal rather than an increment to income, but it cannot be disputed that capital gains are an increment. For the purposes of the estate tax charitable deduction, once the bare minimum distribution to charity is assured, it does not matter where the increment goes.

20. The defendant would have the Court follow the very few cases that have dealt with the power of a trustee to allocate receipts between principal and income. The only recent case cited to the Court which has dealt with that situation is Van Den Wymelenberg v. U. S., 397 F.2d 443 (7th Cir. 1968) cert. den. 393 U.S. 953 (1969). That case was a gift tax case and under the gift tax law the considerations for special tax treatment are very different than under the estate tax. The taxpayer in Van Den Wymelenberg was trying to qualify for an annual gift tax exclusion. To do that it is necessary to value the present interest given. When the power to allocate receipts between principal and income is involved, the net income to the present interest holder could be reduced by allocating receipts all to principal and no minimum would be guaranteed. In the estate tax charitable deduction situation, it is not necessary to value the present interest, but only the remainder.

The reason becomes clearer, not more difficult, in the regulated investment company situation. A regulated investment company, or "mutual fund" as they are more commonly known, is a corporation which makes its money by investing in securities of other companies. The individual investor, by purchasing stock of the regulated investment company, makes an initial investment in the

investment company. The investment company utilizes its capital assets by investing in other companies. It makes its income or profit in three ways: it obtains cash dividends or stock paid by the companies in which it owns shares; it makes a profit from the purchases and sales of the securities in which it deals; or it reflects the appreciated value of the companies in which it has investment and whose shares it still holds. The receipts from the first two types, although they may be distributed in cash or in stock, are dividends to the holders of the regulated investment companies stock. The third class would be that type of appreciation which is traditionally thought of in regard to the holders of the regulated investment companies stock as an increment to principal. No matter the traditional theories of principal and income appreciation, it is still clear that the appreciations are not necessary to make up the ascertainable minimum charitable contribution for which the deduction may be taken.

21. The taxpayer is entitled to a judgment in its favor for the charitable deduction claimed, the amount to be fixed by agreement between the parties.

Further, the parties shall make a written informal report to the Court within ninety days from the date of this order, such report to advise the Court of the status of further negotiations or agreements entered into between the parties.

DONE and ORDERED at Miami, Southern District of Florida, this 2nd day of September, 1969.

/s/ Joe Eaton

United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 29524

D. C. Docket No. Civ. 68-535-JE

THE MIAMI BEACH FIRST NATIONAL BANK, as Executor under the Will of LENORE P. HARTZ, Deceased,

Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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Before Tuttle, Ainsworth and Simpson, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

April 30, 1971

Issued As Mandate: June 15, 1971

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29524

THE MIAMI BEACH FIRST NATIONAL BANK, as Executor under the Will of LENORE P. HARTZ, Deceased,

Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(Filed June 7, 1971)

ON PETITION FOR REHEARING

Before TUTTLE, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX E

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2055. TRANSFERS FOR PUBLIC, CHARITABLE, AND RELIGIOUS USES.

(a) In General.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made before the date prescribed for the filing of the estate tax return)—

* * *

(2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

* * *

APPENDIX F

Treasury Regulations on Estate Tax (1954 Code) (26 C.F.R.):

§ 20.2055-2 Transfers not exclusively for charitable purposes.

(a) Remainders and similar interests. If a trust is created or property is transferred for both a charitable and a private purpose, deduction may be taken of the value of the charitable beneficial interest only insofar as that interest is presently ascertainable, and hence severable from the noncharitable interest. The present value of a remainder or other deferred payment to be made for a charitable purpose is to be determined in accordance with the rules stated in §20.2031-7. Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay the principal to a charitable organization, the present value of the remainder is deductible. To determine the present value of such remainder use the appropriate factor from column 4 of Table I or Table II of §20.2031-7, whichever is applicable. If the interest transferred is such that its value is to be determined by a special computation (see paragraph (e) of §20.2031-7), a request for a specific factor, accompanied by a statement of the date of birth of each person the duration of whose life may affect the value of the remainder, and by copies of the relevant instruments, may be submitted by the executor to the Commissioner, who may, if conditions permit, supply the factor requested.

If the Commissioner does not furnish the factor, the claim for deduction must be supported by a full statement of the computation of the present value made in accordance with the principles set forth in the applicable paragraph of §20.2031-7.

APPENDIX G

TRUST AGREEMENT

THIS AGREEMENT, made and entered into this 17 day of July, 1963, by and between LENORE P. HARTZ of Dade County, Florida, hereinafter called the "Settlor" and THE MIAMI BEACH FIRST NATIONAL BANK of Miami Beach, Florida, and MAXINE FORMAN of Dade County, Florida, hereinafter called the "Trustees".

I. TRUST NAME AND PROPERTY

WITNESSETH, That the Settlor, for the purpose of establishing a trust to be called "The Lenore P. Hartz Trust", has set over and delivered and for an adequate consideration does grant, convey, assign and deliver unto the Trustees, their successors and assigns, all of the property set forth in Schedule A, annexed hereto, IN TRUST, HOWEVER, for the purposes and uses hereinafter set forth. The property set forth in Schedule A and such additional property as may be added thereto and the proceeds and reinvestments thereof as from time to time constituted, including any separate shares from time to time held by the Trustees under the provisions of this agreement, shall constitute the Trust Estate.

II. DISPOSITIVE PROVISIONS

The Trustees shall hold, invest and reinvest the Trust Estate and distribute the net income and principal thereof as follows:

A. During the lifetime of the Settlor the Trustee shall pay or apply to or for the benefit of the Settler the net income therefrom annually or at more frequent intervals convenient to the Settler. If at any time the Settlor shall become incompetent or for any other reason be unable, in the judgment of the Trustees, to act in her behalf, the Trustees may in their discretion pay to or apply for the benefit of the Settler, in addition to the income payments hereinabove provided for her, such amounts from the principal of the Trust Estate as the Trustees may from time to time consider necessary or advisable for the Settlor's support, medical care and general welfare. The Trustees may require and accept such evidence of the Settlor's death or disability, or the duration of such disability, as they may deem advisable, and shall be protected in relying or declining to rely upon any evidence so furnished.

B. Upon the death of the Settlor the Trust Estate shall be distributed or held as follows:

1. The Trustees shall distribute the sum of Ten Thousand Dollars ($10,000.00) to the Settlor's granddaughter, SUZANNE HARTZ HINES. The Settlor hopes that SUZANNE will use this gift for the care of her son, DAVID, but, by this expression, the Settlor does not intend to restrict in any way her absolute ownership and right of disposal of said gift. In the event that SUZZANNE does not survive the Settlor, then said gift shall be distributed to SUZANNE's son, DAVID.

2. The Trustees shall distribute the sum of Five Thousand Dollars ($5,000.00) to the Settlor's friends, BERNARD and JUNE LYNCH, share and share alike, or all to the survivor of them. In the event that neither survives the Settlor, then said sum shall be distributed to their issue per stirpes.

3. The Trustees shall distribute the sum of Five Thousand Dollars ($5,000.00) to the Settlor's nephew, ALEXANDER LYNN PRIDE, if living, otherwise said sum shall be distributed to such person or persons who would have been entitled to such property as his heirs-at-law had he died at the time of the Settlor's death intestate and a resident of the State of Florida.

4. The Trustees shall distribute as follows:

a. To the Settlor's niece, MAXINE FORMAN, the sum of Ten Thousand Dollars ($10,000.00), if living.

b. To the Settlor's friend, IVAH BRITTON, the sum of Ten Thousand Dollars ($10,000.00) if living.

c. To the Settlor's friend, EFFIE SHOWALTER, the sum of Two Thousand, Five Hundred Dollars ($2,500.00), if living.

d. To the Settlor's nephew, WILLIAM VAN PRIDE, the sum of One Thousand Dollars ($1,000.00), if living.

e. To the Settlor's niece, ROSEMOND FORD, the sum of One Thousand Dollars ($1,000.00), if living.

f. To the Settlor's niece, JUNE FANNEN, the sum of One Thousand Dollars ($1,000.00), if living.

g. To the CHURCH-BY-THE-SEA, the sum of Five Thousand Dollars ($5,000.00), in memory of R. F. and WENDELL P. HARTZ, the Settlor's late husband and son.

h. To VARIETY CHILDREN'S HOSPITAL, the sum of Five Thousand Dollars ($5,000.00), in memory of late son, WENDELL P. HARTZ.

i. To SUNNYSIDE SANITORIUM, Indianapolis, Indiana, sum of Five Thousand ($5,000.00).

j. To the MIAMI HEART INSTITUTE, INCORPORATED, the sum of Ten Thousand Dollars ($10,000.00).

5. The Trustees shall retain all of the remainder of the corpus and undistributed income which shall be held, administered and distributed as follows:

a. If the Settlor's niece, MARY PRIDE COMBS, if living, the Trustees shall pay to her, during her lifetime, the sum of Fifty Dollars ($50.00) per month. Such payments shall be made only from the net income of the trust.

b. The Trustees shall distribute all the rest of the net income of the trust to the Settlor's niece, MAXINE FORMAN, for life, then upon her death the trust corpus as then constituted, shall be disposed of as provided in Part c of this Item.

c. Should MAXINE FORMAN predecease MARY PRIDE COMBS, the Trustees shall set apart out of said Trust assets an amount sufficient to purchase and shall purchase therewith, an annuity for the remainder of the life of MARY PRIDE COMBS, equal to the sum of Fifty Dollars ($50.00) per month. Subject to this provision, upon death of MAXINE FORMAN, the trust shall then and there terminate. Upon said termination the trust assets, less all proper deductions, shall be paid over to INDIANA UNIVERSITY, Bloomington, Indiana, to be used for scholarships for needy individuals. This charitable gift is to be in memory of R. F. and L. P. HARTZ.

III. ADDITIONS TO THE TRUST

The Settlor or any other person may at any time add to the Trust Estate any property which is acceptable to the Trustees.

IV. SPENDTHRIFT CLAUSE

No interest of any beneficiary in the principal or income of the Trust Estate or any Trust created hereunder

shall be subject to attachment or claims of creditors of such beneficiary and such interest may not be voluntarily or involuntarily assigned, alienated or encumbered by such beneficiary, except as may be otherwise expressly provided in this trust agreement.

V. PAYMENT OF DEATH TAXES

The Trustees shall pay from the principal of the Trust Estate so much of the estate, inheritance and other death taxes assessed by reason of the death of the Settlor as the Settlor may direct by her will. If the Settlor by her will requires no such contribution but the residuary estate is insufficient, after the payment of debts and administration expenses, to pay such death taxes in full, then the Trustees shall contribute from the principal of the Trust Estate sufficient funds to meet the estate tax deficiency.

VI. GENERAL POWERS OF TRUSTEES

The Trustees shall have the following general powers, duties and discretion in addition to those now or hereafter conferred by law:

A. To retain as an investment any property at any time forming a part of the Trust Estate without regard to the proportion which such property, or property of a similar character, so held, may bear to the entire amount of the Trust Estate.

B. To invest and reinvest any property, including but not by way of limitation, bonds, notes, debentures, mortgages, certificates of deposit, common and preferred

stock, and shares or interests in investment trusts, without regard to the proportion any such investment or investments of a similar character may bear to the entire amount of the trust fund or estate.

C. To sell any property, whether real or personal, at either public or private sale, for cash or on credit; to exchange any such property and to grant options for the purchases thereof.

D. To participate in any plan of reorganization, consolidation, merger, combination or other similar plan, and to consent to any such plan, and any action thereunder, or to any contract, lease mortgage, purchase, sale or other action by any corporation; to deposit any such property with any protective, reorganization or similar committee, to delegate discretionary power to such committee, and to share in payment of its expenses and compensation, and to pay any assessments levied with respect to such property.

E. To exercise all conversion, subscription, voting and other rights of whatsoever nature pertaining to such property, and to grant proxies, discretionary or otherwise, with respect thereto.

F. To register and hold securities or other property in the name of a nominee or in bearer form, and the Trustees' liability shall not be increased or decreased thereby.

G. To make division or distribution of property in kind and for such purpose to determine the value thereof.

H. To exchange, re-exchange, subdivide, develope, improve, dedicate to public use, make or obtain the vacation of public plats, adjust boundries, partition real property and upon exchange or partition to adjust differences in valuation by giving or receiving money or money's worth; to dedicate easements to public use without consideration if deemed by the Trustees to be for the best interest of the trust.

I. To grant leases of real property to begin at once or in the future and to grant leases of all rights and privileges above or below the surface of such real property for any term of years with or without option of purchase and with or without convenant as to the erection of buildings, or as to renewals thereof, through the terms of the lease or renewals extends beyond the term of the trust.

J. To raze existing party walls or buildings and erect new party walls or buildings alone or jointly with owners of adjoining property; to make ordinary or extraordinary repairs or alterations in buildings or other structures.

K. To effect and keep in force fire, rent, title, liability, casualty or other insurance of any nature, in any form and in any amount, for the proper protection of the property and ownership thereof.

L. To create reserves out of income for depreciation, obsolescence, amortization or to insure prompt payment of taxes or assessments, general or special, and other obligations, and to restore to income such reserves as may be unused.

M. To do all such acts, take all such proceedings and exercise all such rights and privileges, although not hereinabove specifically mentioned, with relation to such property as if the Trustees were the absolute owner thereof, and in connection therewith, to enter into any covenants or agreements binding the Trust Estate. All persons shall be fully protected in relying upon the power of the Trustees to execute every written instrument and no one shall be obligated to see to the application of money or property received by it pursuant to the execution and delivery of such instrument.

VII. INCOME AND PRINCIPAL

The Trustees may determine in their sole discretion what is income and principal and they may apportion and allocate to income or principal, as they may deem proper, all receipts, credits, disbursements, charges and expenses, including Trustees' commissions whether computed on income or principal, or both. Except insofar as the Trustees shall exercise this discretion, the following rules shall apply:

A. All dividends on shares of a corporation which form a part of the principal of the trust and are payable in the shares of the corporation shall be deemed principal. All dividends payable otherwise than in the shares of the corporation itself, including ordinary and extraordinary dividends payable in shares or other securities or obligations of corporations other than the declaring corporation, shall be deemed income. Where the Trustees shall have the option of re-

ceiving a dividend either in cash or in the shares of the declaring corporation, it shall be considered a cash dividend and deemed income, irrespective of the choice made by the Trustees.

B. In the event that rights to purchase or subscribe to securities or other property shall accrue upon any property held hereunder, the proceeds of the sale of such rights or in the event of the exercise thereof, the value thereof at the time of such exercise, shall become a part of the principal.

C. As to any property originally or hereafter donated to the trust, all dividends declared but unpaid having a record date prior to the receipt of such property by the Trustees shall belong to the Settlor or the transferor, whereas all other dividends declared but unpaid and all interest and rents accrued but unpaid at the time of the receipt of such property by the Trustees shall belong to the Trust Estate and shall be income.

D. Where any part of the principal consists of bonds or other obligations for the payment of money, they shall be deemed principal at their investory value or in default thereof at their market value at the time they become a part of the Trust Estate, regardless of their par or maturity value, and upon their respective maturity or upon their sale, any loss or gain realized thereon shall fall upon or enure to the principal.

VIII. RIGHTS RESERVED BY SETTLOR

The Settlor reserves the right from time to time to alter, amend or revoke this Agreement, in whole or in part, by an instrument in writing signed and acknowledged by the Settlor and delivered to the Trustees; provided, however, that if this Agreement shall be so altered or amended the duties, rights, powers, liabilities and immunities of the Trustees hereunder shall not be modified or altered without their written consent. In the event of a revocation of the Trust the Trustees shall deliver to the Settlor, or to such other person or persons as they shall be directed so to do in such instrument in writing, such part or all of the Trust Estate with respect to which this Agreement shall have been revoked, free and discharged of any trust; provided, however, that the Trustees may at all times retain property sufficient, in their opinion, to pay their compensation and expenses under this Agreement.

IX. RESIGNATION OF TRUSTEES

The Trustees may resign without leave of court, the Settlor or any other person by mailing written notice of such resignation to the Settlor, if she is then living or, if she is not then living, by mailing such notice to the current adult income beneficiary or benficiaries. Such resignation shall become effective on the date specified in the notice which shall not be less than sixty (60) days from the date of the mailing thereof. In the event of such resignation, the Settlor, if living, shall have the right and power to appoint an individual or corporate successor trustee or trustees of her choice. If the Settlor is not living, the adult beneficiary or a majority of the adult beneficiaries to

whom or to whose use the current net income of the Trust Estate is at the time authorized or required to be paid or applied shall have the right and power to appoint an individual or corporate successor trustee or trustees.

X. COMPENSATION OF TRUSTEES

The Trustees shall be entitled to compensation for their services hereunder to be determined from time to time by the application of the current rates then charged by the Trustee for trusts of a similar size and character, and in the event the Trustees are called upon to render any extraordinary services, they shall be entitled to additional compensation therefor.

XI. ACCOUNTING PROCEDURE

A. The Trustees may, at any time and from time to time, render an account of their transactions with respect to the Trust Estate, and the Settlor shall have full power to settle finally any such account and, on the basis of such account, to release the Trustees, both individually and as Trustees, from all liability, responsibility or accountability for acts or omissions as Trustees.

B. After the death of the Settlor the Trustees shall make an annual accounting to the adult primary beneficiary or beneficiaries of the Trust Estate. The approval of any account by such primary beneficiary or beneficiaries shall be final and binding upon all persons as to the matters and transactions shown in that account.

C. Notwithstanding the foregoing provisions, the Settlor grants to the Trustee, to the extent permitted by law, the power and discretion to submit the administration of the Trusts to judicial settlement under Chapter 737, Florida Statutes, and thereafter the Trustees shall be relieved of any further obligation to account other than such as may be required under said chapter.

XII. GOVERNING LAW

The construction of this instrument, the validity of the interest created hereby and the administration of the Trust Estate and the separate trusts shall be governed by the laws of the State of Florida.

IN WITNESS WHEREOF, the Settlor has hereunto set her hand and seal, and the Trustees have caused these presents to be executed in their name, the Corporate Trustee acting through its Trust Officer, attested by its cashier and having affixed its seal this the day and year first above written.

Signed, Sealed and Delivered in the presence of:

John H. Test

_____

As to Settlor

_____

Lenore P. Hartz (SEAL)

_____

Settlor

Helen M. Hooker

M. B. Stebbins

As to Corporate Trustee

John H. Test

As to Individual Trustee

THE MIAMI BEACH FIRST NATIONAL BANK

By John H. Test (SEAL)

Trust Officer

Attest: G. E. Baker

Cashier

Maxine L. Forman (SEAL)

Trustees

APPENDIX H

INTERNAL REVENUE SERVICE

CHIEF COUNSEL LIST OF PENDING CASES

PAGE 1791 MAY 1971

Issue Number	*Counsel Office*		*Groups*	*Court*	*Name of Taxpayer*	*Date of Origin*	*Docket Number*
2055.03-03	Presently Ascertainable Charitable Remainder						
	Tax Court Div	*		3 Cir	Stewart L M 436 F2D1281	02-68	689-68
	Ref Lit Div	*		9 Cir	Gardiner M J	10-65	
		*		3 Cir	Peoples Trust Company	09-67	
		*		Ed Pa	Dilworth Reba R	02-68	
		*		5 Cir	Miami Beach First Nat	05-68	
		*		5 Cir	Florida National Bank	06-68	
		*		Ed Pa	Provident National Bank	06-69	
		*		6 Cir	Loyd Dorothy	06-69	
		*		S Ohio	Toulmin Harry A	07-69	
		*		Conn	Hartford National Bank	08-69	
		*		Colo	Colorado National Bank	09-69	
		*		Nd Tex	Doss Meek Lane	11-69	
		*		Sd Ill	Burroughs Gordon	01-70	
		*		Nd Ill	Raider Eleanore K	03-70	
		*		E Mich	Detroit Bank & Trust	05-70	
		*		Colo	American National	08-70	
		*		Md	Mercantile-Safe Deposit	10-70	
		*		Nebr	First National Bank	10-70	
		*		Sd NY	Johnston Oswald L	10-70	
		*		Sd Ill	Millikin National	11-70	
		*		R I	Industrial National Bank	12-70	
	Boston	*		Tax Ct	Bunker Margaret P	09-70	5798-70
		*		Tax Ct	Ettlinger Eva	09-70	5956-70
		*		Tax Ct	Lancaster Southworth	02-71	838-71
	Buffalo	*		Tax Ct	Sauer Leo	02-71	773-71
	New York City	*		Tax Ct	Jaecker Harry C	02-69	824-69

INTERNAL REVENUE SERVICE

CHIEW COUNSEL LIST OF PENDING CASES

PAGE 1792 MAY 1971

Issue Number	*Counsel Office*	*Groups	*Court*	*Name of Taxpayer*	*Date of Origin*	*Docket Number*
2055.03-03	Presently Ascertainable Charitable Remainder					
		*	Tax Ct	Ignatinsky Bertha	05-69	2055-69
		*	Tax Ct	Mair William J	01-70	238-70
		*	Tax Ct	Clay Charles M	06-70	3170-70
		*	Tax Ct	Lamson Louise N	11-70	6974-70
	Philadelphia	*	Tax Ct	Speer George I	07-69	3346-69
		*	Tax Ct	Groh Ida Caster	11-70	6907-70
		*	Tax Ct	Johnson Emily Cooper	12-70	7683-70
	Washington	*	Tax Ct	Geiger Margaret May	12-68	6039-68
		*	Tax Ct	Griswold Roger W	08-70	5091-70
	Atlanta	*	Tax Ct	Baldwin Louvine M	12-70	7794-70
	Jacksonville	*	Tax Ct	Evans Irving	06-70	3442-70
		*	Tax Ct	Balch Bess D	04-71	2379-71
	Cleveland	*	Tax Ct	Reed Martha Stecher	04-69	1855-69
	Chicago	*	Tax Ct	Breault Oscar J Est	06-64	3022-64
		*	Tax Ct	Feigenholtz H L Transf	09-64	4963-64
		*	Tax Ct	Feigenholtz Et Al Transf	09-64	4964-64
	Omaha	*	Tax Ct	Obrien Richard F	02-70	733-70
		*	Tax Ct	Falk Pearl H	07-70	4351-70
	Los Angeles	*	Tax Ct	Matson Estate Esther	07-70	4829-70
		*	Tax Ct	Kime Mabel N	12-70	7645-70
	Phoenix	*	Tax Ct	Waldron Gerald N	12-68	6012-68
	Salt Lake City	*	Tax Ct	Kallas James	09-70	5667-70

Groups 46 Cases 48

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of May, 1971, the foregoing Petition for Writ of Certiorari Appellee was served upon the Respondent by mailing a copy thereof by United States Mail, postage prepaid, as follows:

Assistant Attorney General,
Tax Division
United States Department
of Justice
Washington, D.C. 20530
Attention: Mr. Lee A. Jackson
Chief, Appellate Section
(3 copies)

Mr. K. Martin Worthy
Chief Counsel
Internal Revenue Service
Washington, D.C. 20224
(3 copies)

Mr. Robert W. Rust
United States Attorney
P.O. Box 1070
Miami, Florida
(3 copies)

William Archie Brown
Of Counsel

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-350

THE MIAMI BEACH FIRST NATIONAL BANK, AS EXECUTOR UNDER THE WILL OF LENORE P. HARTZ, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on April 30, 1971 (Pet. App. C1-C2). A petition for rehearing was denied on June 7, 1971 (Pet App. D1). No application for an extension of time for filing a petition for a writ of certiorari having been filed within the 90-day period prescribed by 28 U.S.C. 2101 (c), the 90-day period expired on September 5, 1971.[1]

[1] On September 14, 1971, after expiration of the 90-day statutory period, petitioner filed an application for an extension of time within which to file a petition for a writ of certiorari to and including September 8, 1971. On September 21, 1971, Mr. Justice Douglas signed an order extending the time to and including September 8, 1971, "without prejudice to the Court's consideration of whether this application has been filed in time."

The petition was filed on September 8, 1971. Since the 90-day time limitation is jurisdictional, the petition is untimely and should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971